

STATE OF MICHIGAN
COURT OF APPEALS

ERIN ELIZABETH FITES,

Plaintiff-Appellee,

v

JOHANNES VONHAAN FREY,

Defendant-Appellant.

UNPUBLISHED
February 20, 2007

No. 273084
Kalamazoo Circuit Court,
Family Division
LC No. 97-003262-DP

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's order denying his motion to change an existing child custody order granting sole physical custody of the parties' minor son to plaintiff. We affirm.

Defendant contends that the trial court erred in failing to consider the evidence regarding the changes in his life including his marriage, employment, home, and family, when determining whether defendant presented sufficient evidence to warrant reevaluation of the existing custody order. He argues that a trial court is not precluded, as a matter of law, from considering improvements in the non-custodial parent's life when determining whether to revisit a custody order.

Whether the trial court may consider changes in the non-custodial parent's home in determining whether proper cause or a change of circumstances exists, warranting reevaluation of a custody order under MCL 722.27(1)(c), is a question of law. Further, whether the facts asserted by defendant were legally sufficient to establish proper cause or a change of circumstances is a question of law. In child custody cases, we review questions of law for clear legal error. MCL 722.28; *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). A trial court commits clear legal error when it incorrectly chooses, interprets, or applies the law. *Id.* We review the trial court's findings of fact under the great weight of the evidence standard. *Id.*

The Child Custody Act of 1970, MCL 722.21 *et seq.*, governs child custody disputes between parents. *Mason v Simmons*, 267 Mich App 188, 194; 704 NW2d 104 (2005). The purpose of the Act is to promote the best interests of the child, and it is to be liberally construed. MCL 722.26(1); *Frame v Nehls*, 452 Mich 171, 176; 550 NW2d 739 (1996). A child custody order may only be modified upon a showing of proper cause or a change of circumstances that

establishes that the modification is in the child's best interests. MCL 722.27(1)(c); *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). The movant has the burden of proving, by a preponderance of the evidence, that either proper cause or a change of circumstances exists. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003).

[T]o establish "proper cause" necessary to revisit a custody order, a movant must prove by a preponderance of the evidence the existence of an appropriate ground for legal action to be taken by the trial court. The appropriate ground(s) should be relevant to at least one of the twelve statutory best interest factors, and must be of such magnitude to have a significant effect on the child's well-being. [*Id.* at 512.]

The criteria outlined in the best interests of the child factors, MCL 722.23, "should be relied on by a trial court in deciding if a particular fact raised by a party is a 'proper' or 'appropriate' ground to revisit custody orders." *Id.* at 511-512. Trial courts must make this determination on a case-by-case basis. *Id.* at 512.

[I]n order to establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best interest factors. [*Id.* at 513-514 (emphasis in original).]

The best interests of the child factors clearly encompass the circumstances of both the custodial and non-custodial parent. Several of the factors explicitly refer to "the parties involved." Further, factor (e) directs the trial court to consider the permanence of the existing *or proposed custodial home* which, in this case, includes defendant's home. MCL 722.23(e). Evidence regarding defendant's marriage, family, home, employment, and financial status was clearly relevant to factor (e). "[T]he focus of factor e is the child's prospects for a stable family environment." *Ireland v Smith*, 451 Mich 457, 465-466; 547 NW2d 686 (1996). Further, the evidence was relevant to factor (c), the capacity and disposition of the parties involved to provide the child with food, clothing, medical care, other remedial care, and other material needs. MCL 722.23(c). Thus, the trial court erred in refusing to consider the changes in defendant's circumstances and the non-custodial home. The evidence was relevant to the best interest factors set forth in MCL 722.23. Therefore, the evidence was relevant to the trial court's determination of whether defendant established proper cause or a change in circumstances for purposes of MCL 722.27(1)(c). *Vodvarka, supra*.

When a trial court incorrectly chooses, interprets, or applies the law, it commits legal error that this Court is bound to correct. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). Upon a finding of error, an appellate court should remand the case for reevaluation,

unless the error was harmless. *Id.* at 889. In this case, the error was harmless. Even considering the evidence regarding the changes in defendant's circumstances, defendant failed to prove by a preponderance of the evidence that proper cause or a change of circumstances existed for purposes of reevaluating the existing custody order.

In support of his motion to change custody, defendant presented evidence that plaintiff suffered from mental illnesses and substance abuse problems. The evidence was relevant to the best interests of the child factors. See MCL 722.23(g). However, for purposes of modifying a child custody order under MCL 722.27(1)(c), a change of circumstances must have occurred after entry of the last custody order. *Vodvarka, supra* at 514. Thus, the movant cannot rely on facts that existed before entry of the custody order to establish a change of circumstances. *Id.*

The same is not necessarily true for proving proper cause, though in most cases it will hold true. The phrase "proper cause" is not by the words themselves tied to a change in events as is "change of circumstances." Rather, proper cause is geared more toward the significance of the facts or events or . . . the appropriateness of the grounds offered. However, we believe a party would be hard-pressed to come to court after a custody order was entered and argue that an event of which they were aware (or could have been aware of) before entry of the order is thereafter significant enough to constitute proper cause to revisit the order. [*Id.* at 515.]

The custody order granting sole physical custody of the parties' minor son to plaintiff was entered on July 10, 1998. The evidence in this case clearly establishes that plaintiff suffered from mental illnesses and substance abuse problems, and that defendant had knowledge of plaintiff's mental illnesses and substance abuse problems, before the custody order was entered. In 1993, four years before the parties' son was born, plaintiff and defendant met at a halfway house, where they both received treatment for mental illnesses. Further, defendant acknowledged, in his affidavit, that plaintiff was hospitalized for anxiety disorder, depression, panic disorder and alcoholism numerous times since she was a teenager. Thus, defendant cannot rely on evidence of plaintiff's mental illness, which existed before entry of the custody order, to establish a change of circumstances. *Vodvarka, supra* at 514. Further, he cannot now argue that plaintiff's mental illness, which he was undoubtedly aware of before entry of the custody order, is significant enough to constitute proper cause to revisit the order. *Id.* at 515.

Defendant also argues that the changes in his own circumstances warrant reevaluation of the custody order. The undisputed evidence in this case establishes that, after the custody order was entered, defendant married, became gainfully employed, and had two children with his wife. Defendant argues that because of the improvements in his circumstances, he is more capable, than plaintiff, of providing the parties' minor child with a stable and nurturing environment in which to live. The evidence regarding the changes in defendant's circumstances was relevant to the best interest factors and, therefore, was relevant to the determination of whether proper cause or a change of circumstances exists. However, the evidence was not sufficient to establish a change of circumstances for purposes of MCL 722.27(1)(c). The alleged changes in defendant's circumstances, i.e., marriage, employment, and home ownership, are nothing more than normal life changes. A normal life change cannot amount to a change of circumstances for purposes of reevaluating a custody order. *Vodvarka, supra* at 513. Further, these normal life changes do not establish proper cause because they do not amount to a fact that would have a significant impact

on the child's well-being. For example, defendant asserted that he and his wife were able to provide the child with food, clothing, a bicycle, and a bedroom. However, nothing in the record indicates that plaintiff was unable or refused to provide those same items for the child. Thus, the evidence regarding the changes in defendant's circumstances was insufficient to warrant a best interest hearing in this case. *Id.*

Defendant also contends that a change of circumstances exists because plaintiff's driver's license was revoked and she failed to seek reinstatement of the license when she became eligible. The evidence in the record as a whole indicates that plaintiff was generally able to obtain the necessary transportation for the parties' child. Thus, defendant failed to establish that the fact plaintiff does not have a driver's license had or could have a *significant* effect on the child's well-being. *Vodvarka, supra.*

Defendant also contends that a reevaluation of the custody order is warranted because the child's school records demonstrate that he has had behavioral problems and that he has had an unacceptable number of absences from school. The evidence establishes that the child was absent from school 17 days in kindergarten, 31 half days in first grade, and 27 half days in second grade. However, plaintiff testified that at least some of the absences were attributable to the child's illnesses, including strep throat. Further, contrary to defendant's assertion, the child's school records indicate that, although he has experienced some difficulty staying focused at school, presumably because of his diagnosed attention deficit hyperactivity disorder (ADHD), his performance in school was at least at an average level. Report cards indicate that the child had a positive attitude, that he was "a delightful young man," that he was proficient in reading, comprehension, spelling and math, and that he continued "to show good growth academically." Thus, defendant has not shown that the child's absences or performance in school has had such a significant impact on his well-being that it required a reevaluation of the custody order. A trial court's ultimate decision regarding custody must comport with the great weight of the evidence. *Foskett, supra* at 13. The trial court's findings that the child's "overall academics seem to be progressing at a steadfast pace" and that his ADHD was "not the significant problem that the Defendant wishes this court to believe that it is" were not against the great weight of the evidence.

Finally, defendant contends that proper cause existed because there was evidence that plaintiff physically abused the child. Defendant submitted documentary evidence establishing that protective services conducted an investigation and determined that there was evidence of physical abuse in plaintiff's home. According to the report issued by protective services, there were allegations that plaintiff struck her children¹ with a closed fist. The report also indicated that "the children are clear there has [sic] been multiple incidents of physical discipline resulting in injury in the past." Plaintiff admitted that she spanked her children, but denied striking them with a closed fist. She also testified that she never administered discipline that resulted in bruising or physical harm to the children. Based on a review of the evidence in the record as a

¹ Plaintiff also had sole physical custody of another, younger child. Defendant was not the younger child's father.

whole, we conclude that the protective services investigation report was not sufficient to establish proper cause for purposes of reevaluating the existing custody order in this case. First, although protective services apparently found evidence of physical abuse in plaintiff's home, no further actions were taken by protective services. Plaintiff's psychiatrist opined that plaintiff was "doing an excellent job as a parent." Further, a clinical social worker, who met with plaintiff multiple times, indicated that "she had no reason to suspect current abuse or neglect of the boys" and that the discipline issues raised by plaintiff were "not outside the normal realm of parental issues and response." Therefore, the allegation of physical abuse in this case, although serious, was not sufficient to establish proper cause. Cf. *Vodvarka, supra* at 516-517, in which the submitted evidence established that: (1) the plaintiff had been convicted of third-degree child abuse; (2) the plaintiff had lost custody of two of her other children; (3) the plaintiff exhibited inappropriate behavior toward the defendant; and (4) the plaintiff attempted to prohibit the defendant from visiting the child. Unlike the evidence in *Vodvarka, supra*, the evidence in this case does not support the conclusion that plaintiff "has had serious problems with parenting children." *Id.* In concluding that this evidence was not sufficient to establish proper cause, we are mindful that the Legislature's intent underlying the Child Custody Act was to "minimize the prospect of unwarranted and disruptive change of custody orders and to erect a barrier against removal of a child from an 'established custodial environment' except in the most compelling cases." *Baker v Baker*, 411 Mich 567, 576-577; 309 NW2d 532 (1981).

The movant must establish that proper cause or a change of circumstances exists *before* the trial court may determine if an established custodial environment exists and conduct a review of the best interest factors to determine if the custody order should be modified. *Vodvarka, supra* at 508-509. Defendant failed to establish proper cause or a change in circumstances. Therefore, the trial court was not authorized to revisit the existing custody order and engage in a reconsideration of the statutory best interest factors. *Id.*; See also *Killingbeck v Killingbeck*, 269 Mich App 132, 145; 711 NW2d 759 (2005). Defendant's failure to present sufficient proof of proper cause or changed circumstances precluded further review of his motion to change custody. *Vodvarka, supra*.

"The plain and ordinary language used in MCL 722.27(1)(c); MSA 25.312(7)(1)(c) evinces the Legislature's intent to condition a trial court's reconsideration of the statutory best interest factors on a determination by the court that the party seeking the change has demonstrated either a proper cause shown or a change of circumstances. *It therefore follows as a corollary that where the party seeking to change custody has not carried the initial burden of establishing either proper cause or a change of circumstances, the trial court is not authorized by statute to revisit an otherwise valid prior custody decision and engage in a reconsideration of the statutory best interest factors.*" [*Dehring v Dehring*, 220 Mich App 163, 165; 559 NW2d 59 (1996), quoting *Rossow v Aranda*, 206 Mich App 456, 458; 522 NW2d 874 (1994) (emphasis added).]

Therefore, the trial court properly denied defendant's motion to change custody.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael R. Smolenski

/s/ Christopher M. Murray